Supreme Court, U.S.
FILED
941391 JAN 19 1995
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1994

DYWANE CARL STONUM,
Petitioner

vs.

CCH COMPUTAX INC.,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Petition for Writ of Certiorari

Lawrence M. Schulner,
California Bar No.
35193

Attorney of Record
for Petitioner,
DYWANE CARL STONUM

L.M. Schulner &
Associates
360 Mobil Avenue,
Suite #107
Camarillo, CA 93010
(805) 484-0453

4/ORP

QUESTION PRESENTED FOR REVIEW

1.) Does Title VII of the Civil Rights Act of 1964, as amended, require an employer to provide a pre-termination performance review to protected-class employees?

LIST OF PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1. Plaintiff/Appellant/Petitioner: DYWANE CARL STONUM, an individual.

2. Defendant/Appellee/Respondent: CCH COMPUTAX INC., a Delaware Corporation and a wholly-owned subsidiary of Commerce Clearing House, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
REFERENCE TO OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
GROUNDS FOR GRANT OF CERTIORARI	7
CONCLUSION	12
APPENDIX	
1. EEOC Determination	14
2. EEOC Determination on Review and Dismissal	19
3. Order Granting Summary Judgment	22
4. Ninth Circuit Memorandum	24
5. Ninth Circuit Denial of Rehearing	34

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 802 (1973) 12

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 9

UNITED STATES COURT OF APPEALS

Vaughn v. Edel,
918 F.2d 517, 519, 520,
522,(5th Cir.1990) 9,10,10-11,11

UNITED STATES CODE

42 U.S.C. § 2000e-2(a). 8-9

OTHER

Rules of the U.S. Supreme Court,
Rule 10 (a) 7

Rules of the U.S. Supreme Court,
Rule 10 (c) 7

REFERENCE TO OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1. Dywane Stonum v. CCH Computax, Inc., No. 93-55832, August 12, 1994, Unpublished Memorandum, 34 F.3d 1073.

2. Dywane Stonum v. CCH Computax, Inc., No. 93-55832, October 21, 1994, Order Denying Petition for Rehearing.

STATEMENT OF JURISDICTION

DYWANE CARL STONUM petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from that Court's Memorandum No. 93-55832, filed August 12, 1994, 34 F.3d 1073, and that Court's October 21, 1994 Order denying STONUM's Petition for Rehearing.

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

1.) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et. seq., specifically 42 U.S.C. § 2000e-2(a).: "It shall be an unlawful employment practice for any employer to (1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

This case arises out of the discharge of DYWANE CARL STONUM from his employment with CCH COMPUTAX INC ("COMPUTAX"). On October 12, 1987, COMPUTAX hired Mr. STONUM to serve as a tax analyst for the State Corporation Team. Mr. STONUM's first 90 days of employment were probationary.

Mr. STONUM was the only African-American member of his unit. On his 91st day of employment (January 11, 1988), COMPUTAX discharged Mr. STONUM. According to the terms of COMPUTAX's written offer of emplcyment, Mr. STONUM was to be reviewed at the end of his probationary period.

This review did not occur, although other, non-African-American employees, who remained employed, received the review. Throughout his employment with COMPUTAX, it never informed Mr. STONUM that his employment was in jeopardy.

Mr. STONUM exhausted his administrative remedies with the California Department of Fair Employment and Housing and the U.S. Equal Employment Opportunity Commission (EEOC). (Appendix, No. 1--Determination; Appendix, No. 2--Determination on Review and Dismissal).

On September 6, 1991, Mr. STONUM filed suit in the United States District Court for the Central District of California, alleging that COMPUTAX had discharged him in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et. seq.

The District Court had subject matter jurisdiction under both Title VII and 28 U.S.C. § 1331. Mr. STONUM acted as his own attorney.

On March 22, 1993, COMPUTAX moved for summary judgment on the grounds that Mr. STONUM could not meet his burden of proving that COMPUTAX discriminated against him.

Mr. STONUM opposed the motion, arguing, *inter alia*, that COMPUTAX's failure to provide

him with the performance review provided to non-African-American employees deprived him of the opportunity afforded those employees to improve his performance. The District Court granted COMPUTAX's motion. (Appendix, No. 3-- Order).

Mr. STONUM filed a timely appeal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit had jurisdiction to hear the appeal under 28 U.S.C. § 1291.

On August 12, 1994, the Ninth Circuit issued a Memorandum, affirming the District Court's grant of summary judgment. (Appendix, No. 4--Memorandum). On October 21, 1994, the Ninth Circuit denied Mr. STONUM's petition for rehearing. (Appendix, No. 5-- Denial of Rehearing).

Mr. STONUM has now retained counsel and presents this Court with this Petition for Writ of Certiorari.

GROUNDS FOR GRANT OF CERTIORARI

Under Rule 10 (a) of the Rules of the U.S. Supreme Court, this Court may grant certiorari "(w)hen a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter...as to call for an exercise of this Court's power of supervision." Under Rule 10 (c), this Court may grant review to settle important questions of federal law.

Given the importance of the issue of performance reviews and their relevance in determining whether disparate treatment of protected-class employees has occurred, this issue cries out for clear guidelines and uniformity among the Federal Circuits.

This issue is of vital importance not only to protected-class employees, but to their employers as well. Both have an interest in receiving a clear mandate defining how Title VII affects not only an employee's

rights but his or her obligations regarding improvement of performance.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to:

> "...(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

> otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-2(a).

Employers must be provided with a practical means to comply with the purpose of Title VII, i.e., ensuring that "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees" (see Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). Protected-class employees must be informed of deficiencies and provided an opportunity to improve.

In his opposition to COMPUTAX's Motion for Summary Judgment, and in his Opening and Reply Briefs before the Ninth Circuit, Mr. STONUM cited, albeit unartfully, Vaughn v. Edel, 918 F.2d 517 (5th Cir.1990).

Vaughn involved a female black attorney who had been discharged from her employment

with Texaco. Vaughn's supervisor, Edel, complained to Vaughn that her work volume was low and that she had excessive visitors to her office during working hours. Id., 918 F.2d at 919. Vaughn complained to another supervisor, Keller, and Keller responded that Vaughn was becoming a "black matriarch" within Texaco, who was visited in her office by "predominantly blacks," and that this was interfering with her work. Ibid. These remarks offended Vaughn and she sought advice from a fellow Texaco attorney. Ibid. Keller learned of Vaughn's seeking legal advice and told Edel not to confront her again about the declining quality of her work. Ibid. Texaco later discharged Vaughn as part of a cost-cutting program that eliminated the "poorest performers." Id., 918 F.2d at 520.

The Fifth Circuit held:

> "in neither criticizing Vaughn when her work was unsatisfactory nor counselling

her how to improve, Texaco treated Vaughn differently that it did its other [employees] because, as the magistrate found, she was black. As a result, Texaco did not afford Vaughn the same opportunity to improve her performance, and perhaps her relative ranking, as it did its white employees."

Id., 918 F.2d at 522. (Emphasis added).

Mr. STONUM respectfully submits that COMPUTAX's failure to provide him, the only African-American in his unit, with the performance review afforded non-African-American employees, who remained employed, deprived him of "the same opportunity to improve (his) performance, and perhaps (his) relative ranking, as (COMPUTAX) did its (non-African-American) employees." See Vaughn, *supra*, 918 F.2d at 522.

The Ninth Circuit's Memorandum makes no

mention of Vaughn, holding that Mr. STONUM failed to present a *prima facie* case of discrimination. By its silence on Vaughn, the Ninth Circuit held that COMPUTAX's failure to provide a pre-termination performance review to Mr. STONUM did not create an "inference of unlawful discrimination." See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In that respect, the Ninth Circuit's Memorandum conflicts with Vaughn.

CONCLUSION

For the reasons stated above:

1. The importance of the issue of performance reviews and their relevance in determining whether disparate treatment of protected-class employees has occurred;

2. The need to advance the purposes of Title VII in ensuring that race, sex, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees and;

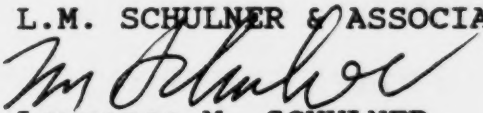
3. The need for uniformity among the

Federal Circuits,

Mr. STONUM urges this Court to grant this Petition and provide guidance to employees, employers, and courts on an issue of nationwide importance.

Respectfully re-submitted: February 10, 1995 (originally submitted, January 19, 1995)

L.M. SCHULNER & ASSOCIATES

By: 

Lawrence M. SCHULNER,
Attorney for Petitioner,
DYWANE CARL STONUM

APPENDIX NO. 1--EEOC DETERMINATION

Charge No. 340880687

Dywane Stonum
604 N. Market Street
Inglewood, CA 90302 Charging Party

CCH Computax Inc.
21250 Hawthorne Blvd.
Torrance, CA 90503-5502 Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met. Charging Party alleged that he was discriminated against in violation of Title

VII in that he was discharged because of his race, Black and was given a higher work load.

Examination of the evidence indicates that the non Black probationary employee in Charging Party's unit did not have a similar performance problem. Further, the evidence obtained during the investigation shows that Charging Party and the non Black probationary employee had an equal work load.

Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

This determination does not conclude the processing of this charge. If the Charging Party wishes to have this determination reviewed, he must submit a signed letter to the Determinations Review Program which clearly sets forth the reasons for requesting the review and which lists the Charge Number

and Respondent's name. Charging Party must also attach a copy of this Determination to his letter. These documents must be personally delivered or mailed (postmarked) on or before (illegible) to the Determinations Review Program, Office of Program Operations, EEOC, 1801 L Street, N.W. Washington, D.C. 20507. It is recommended that some proof of mailing, such as a certified mail receipt, be secured.

If the Charging Party submits a request by the date shown above, the Commission will review the determination. Upon completion of the review, the Charging Party and Respondent will be issued a final determination which will contain the results of the review and what further action, if any, the Commission may take. The final determination will also give notice, as appropriate, of the Charging

Party's right to sue.

If the Charging Party does not request a review of this determination by July 12 1990, this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue by the Commission.) FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by October 11, 1990, the Charging Party's right to sue will be lost. The Commission's regulations governing no cause determinations are printed in Title 29, Code of Federal Regulations, Section 1601.19.

On Behalf of the Commission:

Date /s/

DOROTHY J. PORTER, Director

Los Angeles District Office

Encl: Information Sheet on Filing Suit
in Federal District Court

APPENDIX NO. 2--EEOC DETERMINATION ON REVIEW AND DISMISSAL

TO: Dywane C. Stonum June 13,1991

604 North Market Street

Inglewood, CA 90302 Charge No.

340880687

Dywane C. Stonum CCH Computax, Incorporated

Charging Party Respondent

DETERMINATION ON REVIEW AND DISMISSAL OF TITLE VII CHARGE

The Commission has reviewed the investigation of this charge of employment discrimination and all supplemental information furnished. Based upon this review, we agree with the determination issued by our field office and hereby issue a final determination that the evidence obtained during the investigation does not establish a violation of the statute.

Therefore, the Commission dismisses and terminates its administrative processing of this charge.

As the charge alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a private action in Federal District Court against the Respondent(s) named above within 90 days of receipt of this Determination.

IF THE CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST.

On Behalf of the Commission:

/s/

Michael Dougherty

Director

Determinations Review Program

Enclosure: Information Sheet of Filing
Suit in Federal District Court

cc: Dorothy Porter
Director
Los Angeles District Office

APPENDIX NO. 3--ORDER GRANTING SUMMARY JUDGMENT

FILED: MAY 21, 1993

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DYWANE CARL STONUM, CV-91-4819 TJH (JRx)

Plaintiff,

v. ORDER

CCH COMPUTAX INC.,

Defendant

The Court, having considered Defendant's motion for summary judgment, with the moving and opposing papers,

It is Ordered that the motion be, and

hereby is, Granted.

Date: May 20, 1993

/s/

Terry J. Hatter, Jr.

United States

District Judge

APPENDIX NO. 4--NINTH CIRCUIT MEMORANDUM

FILED: AUGUST 12, 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DYWANE STONUM,	) No. 93-55832
Plaintiff-Appellant,	) D.C. No. CV-91-04819-TJH
v.	)
CCH COMPUTAX INC.,	) MEMORANDUM*
Defendant-Appellee.	)

Appeal from the United States District Court for the Central District of California
Terry J. Hatter, District Judge, Presiding

Submitted August 3, 1994**

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges.

Dywane Carl Stonum appeals pro se the district court's summary judgment in favor of

CCH Computax, Inc. (Computax) in his action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII) alleging that Computax terminated his employment because of his race (Black). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We review de novo a district court's grant of summary judgment to determine whether any genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law. Sengupta v. Morrison-Knudsen Co., Inc. 804 F.2d 1072, 1074 (9th Cir. 1986). Summary judgment is appropriate when the plaintiff

> " fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Title VII prohibits employers from discriminating on the basis of race. 42 U.S.C.

§ 2000e-2 to-3. A plaintiff alleging a violation of Title VII bears the initial burden of establishing a prima facie case by introducing evidence that gives rise to an inference of unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Sischo-Nownejad v. Merced Community College District, 932 F.2d 1104, 1109-10 (9th Cir. 1991). Where the plaintiff alleges that his employment was terminated because of his race or other protected characteristic, he may meet this burden by producing evidence that (1) he is a member of a protected class; (2) he was performing his job well enough to rule out the possibility that he was fired for inadequate job performance; (3) he was terminated; and (4) he was replaced by a person outside the protected class. Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 671-72 (9th Cir. 1988). Once the plaintiff makes a prima facie showing, the burden shifts to the defendant to articulate a

legitimate, non discriminatory reason for the challenged conduct; if the defendant carries this burden, the plaintiff then must have an opportunity to show that the defendant's proferred reasons are pretextual. Sischo-Nownejad, 934 F.2d at 1109. The plaintiff bears the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Here, Stonum failed to make a prima facie showing of discrimination. Computax, a company that produces computer programs used to process state and federal income tax returns, hired Stonum as a tax analyst. Tax analysts' essential functions at Computax were to indicate to programmers what changes had to be made to existing programs to reflect changes in tax laws, and to test the revised programs to ensure that they worked properly. At the end of Stonum's 90-day probationary period, Computax terminated Stonum's employment,

citing unsatisfactory performance. Stonum alleged that he was terminated because of his race, and that a white tax analyst who was hired shortly after Stonum, John Forcione, was not terminated. [1]

In support of its motion for summary judgment, Computax proffered the deposition of Stonum's immediate supervisor, Lead Analyst Janice Catino; the declaration of her supervisor, Glen Yamasaki, Director of the State Corporation Team; and the declaration of Kathy Hashimoto, Manager of the Development and Support Department, to whom Yamasaki reported. According to their testimony and supporting documentation, Stonum and Forcione were each assigned eight programs to update. Forcione completed his assignments, which were at least as difficult as the ones assigned to

---

[1] Stonum emphasizes the fact that Computax terminated his employment one day after he had completed his 90-day probationary period. Whether Stonum was a probationary employee when he was terminated is immaterial to his claim of race discrimination, however.

Stonum, in a satisfactory and timely manner, but Stonum failed to update his programs correctly or to test them to ensure they were working properly. When it became apparent that Stonum was not making adequate progress on his products, three of the eight programs originally assigned to Stonum were reassigned to other analysts. Catino and Yamasaki were troubled by the fact that on several occasions, Stonum had told them that he had completed certain updates when he had not in fact done so. With respect to training, Catino stated that Stonum and Forcione received equivalent training except that she had spent more time training Stonum.

Stonum offered no evidence to refute this showing. In his opposition, he merely disagreed with his supervisors' assessment of his performance or offered explanations for his failure to meet their expectations. He alleged, for example, that the was given the "highest workload" and "impossible deadlines"

and received unequal training because of his race. Stonum cited no facts to support these allegations, however. None of the facts Stonum did cite, for example, the fact that he did not receive a written performance evaluation at the end of his probationary period, support a reasonable inference of discrimination. In short, Stonum failed to produce evidence sufficient to raise a genuine issue about whether he was performing his job adequately. See Schuler v. Chronicle Broadcasting Co., 793 F.2d 1010, 1011 (9th Cir. 1986) (plaintiff's subjective judgment that his performance was adequate insufficient to raise a genuine issue of fact). Because he failed to establish this essential element of his prima facie case and produced no evidence that gives rise to an inference of discrimination, the district court properly granted summary judgment in favor of Computax, See Celotex, 477 U.S. at 322; Pejic, 840 F.2d at 674. Summary judgment was also appropriate because Stonum produced

no evidence to refute Computax's explanation for terminating Stonum. See Wallis v. Simplot Co., No. 92-36759, slip op. 7721, 7734-38 (9th Cir. July 14, 1994). (affirming summary judgment in favor of defendant where plaintiff failed to offer any evidence to refute defendant's articulation of a legitimate, nondiscriminatory reason for termination).

Stonum also contends that the district court erred by (1) ruling on the summary judgment motion without holding a hearing; (2) denying sub silentio Stonum's request for an additional continuance to conduct further discovery; (3) failing to enter a separate judgment purusant to Fed. R. Civ. P. 58, and (4) taxing costs before entering such a judgment. None of these claims warrant reversal.

Stonum did not request oral argument on the summary judgment motion. Moreover, where, as here, there is no showing of prejudice, a court's failure to grant oral argument on a

summary judgment motion is not reversible error. See Smith v. Retirement Fund Trust, 857 F.2d 587, 592 (9th Cir. 1988). Nor did the court abuse its discretion by denying sub silentio Stonum's second request for a further continuance pursuant to Fed. R. Civ. P. 56(f). The court had allowed more than eight months for discovery, and Stonum failed to meet his burden of establishing that further discovery would raise a triable issue of fact. See Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987).

We lack jurisdiction to review the district court's order taxing costs because no notice of appeal was filed from the order taxing costs and this appeal was taken before that order was entered. See Culinary and Service Employees Union v. Hawaii Benefit Admin., Inc., 688 F.2d 1228, 1232 (9th Cir. 1982). We note, however, that the court's taxation of costs pursuant to Fed. R. Civ.P. 54(d) has no bearing on the propriety of its

grant of summary judgment.

The district court's judgment is AFFIRMED. Computax's request for sanctions is denied.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

APPENDIX NO. 5--NINTH CIRCUIT ORDER DENYING REHEARING

FILED: OCTOBER 21, 1994

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DYWANE STONUM,	) No. 93-55832
Plaintiff-Appellant,	) D.C. No. CV-91-04819-TJH
v.	)
CCH COMPUTAX INC.,	) ORDER
Defendant-Appellee.	)

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.